Ismail bin Abdul Hamid v OSK & Partners Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–81–96
GOPAL SRI RAM, NH CHAN AND ABU MANSOR JJCA
16, 17 DECEMBER 1996 AND 7 JANUARY 1997

Civil Procedure *— Appeal — Notice of appeal — Appeal from subordinate court — Whether notice of appeal should be filed in Registry of Subordinate Court or Registry of High Court — Subordinate Courts Rules 1980 O 49 r 6(2) & Form 140*

The High Court in this case held the appeal to be out of order because the appellant, against whom summary judgment pursuant to O 26A of the Subordinate Courts Rules 1980 ('the Rules') had been entered, had filed his notice of appeal in the sessions court. The appellant appealed. The key point for decision was whether a party who was dissatisfied with the decision of a subordinate court should file his notice of appeal in the registry of that court.

Held, allowing the appeal:

(1) (Per **Gopal Sri Ram JCA**) Order 49 r 6(2) of the Rules limited the time within which the notice of appeal was to be served on a respondent. It was not to be read as requiring an appellant to lodge his notice of appeal with the Registrar of the High Court. The normal rule of practice and procedure was that a notice of appeal was to be filed at the registry of the court against whose decision an appeal was being preferred. The language in which r 6(2) was couched did not have the effect of reversing this well-established practice. It was thus sufficient for an unsuccessful litigant in the subordinate court to file the notice of appeal with the Registrar of the Subordinate Court (see pp 688F–G and 689B–C); *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 and *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Melaka High Court Civil Appeal No 12–22–95, unreported) followed; *Datuk Bandar Kuala Lumpur v Seman bin Amat* [1996] 3 CLJ 263 overruled.

(2) (Per **Abu Mansor JCA**) Under O 49 r 6(2) of the Rules, an appellant was statutorily required to file his notice of appeal within 14 days in Form 140. It was free of any ambiguity that the notice had to be sent 'To the Registrar, Sessions Court at ..... /The Magistrate at .....' (see p 690C, I).

[Bahasa Malaysia summary

Mahkamah Tinggi di dalam kes ini memutuskan bahawa rayuan yang dibuat adalah di luar aturan kerana perayu, yang terhadapnya penghakiman terus mengikut A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') telah dimasukkan, telah memfailkan notis

A rayuannya di mahkamah sesyen. Perayu membuat rayuan. Soalan utama untuk keputusan adalah sama ada satu pihak yang tidak berpuas hati dengan keputusan sebuah mahkamah rendah patut memfailkan notis rayuannya di pejabat pendaftaran mahkamah itu.

B **Diputuskan**, membenarkan rayuan:

(1) (Oleh **Gopal Sri Ram HMR**) Aturan 49 k 6(2) KMR menentukan tempoh masa yang di dalamnya notis rayuan harus disampaikan ke atas seorang penentang. Ia tidak patut dibaca sebagai memerlukan seseorang perayu memfailkan notis rayuannya dengan Pendaftar Mahkamah Tinggi. Aturan amalan C dan prosedur yang biasa adalah bahawa satu notis rayuan mesti difailkan di pejabat pendaftaran mahkamah yang terhadap keputusannya satu rayuan dibawa. Bahasa yang digunakan dalam k 6(2) tidak mempunyai kesan mengakaskan amalan mantap ini. Dengan itu adalah cukup untuk seorang litigan yang tidak berjaya D di mahkamah rendah memfailkan notis rayuannya dengan Pendaftar Mahkamah Rendah (lihat ms 688F–G dan 689B–C); *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 dan *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Mahkamah Tinggi Melaka Rayuan Sivil No 12–22–95, tidak dilaporkan) diikut; *Datuk Bandar Kuala Lumpur v Seman bin Amat* [1996] 3 E CLJ 263 ditolak.

(2) (Oleh **Abu Mansor HMR**) Di bawah A 49 k 6(2) KMR, seorang perayu dikehendaki secara undang-undang untuk memfailkan notis rayuannya dalam tempoh 14 hari dengan menggunakan Borang 140. Adalah bebas daripada ketaksaan bahawa notis itu F harus dihantar 'Kepada Pendaftar, Mahkamah Sesyen di ..... /Majistret di .....' (lihat ms 690C, I).]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 G Reissue) paras 567–602 and 699.

Cases referred to

Datuk Bandar Kuala Lumpur v Seman bin Amat [1996] 3 CLJ 263
Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd [1995] 4 MLJ 737
H *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292
Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd (Melaka High Court Civil Appeal No 12–22–95, unreported)

Legislation referred to

I Subordinate Courts Rules 1980 O 49 r 6(2), Form 140

Appeal from: Civil Appeal No R3–12–283–95 (High Court, Kuala Lumpur)

B Thangaraj (*Thangaraj & Associates*) for the appellant. A
Isa Aziz Ibrahim (*Cheang & Ariff*) for the respondent.

16 December 1996

Gopal Sri Ram JCA: This appeal concerns a short but important point B
of procedure upon which there is a marked divergence of opinion between High Courts. It has to do with the proper construction that is to be placed on O 49 r 6(2) of the Subordinate Courts Rules 1980 ('the Rules'). Some judges have expressed the view that a party who is dissatisfied with the decision of a subordinate court should file his notice of appeal in the registry of that court. Others have taken the position that the notice should C
be filed in the Registry of the High Court. This difference in opinion between judges of the High Court has resulted in uncertainty in the procedure that is to be adopted.

The present appeal is one such case. The High Court in the instant appeal held the appeal to be out of order because the appellant, against D
whom summary judgment pursuant to O 26A of the Rules had been entered, had filed his notice in the sessions court. The appellant has appealed against this ruling of the judge. At the hearing, counsel said that this is the first time this court has been called upon to resolve the controversy.

Rule 6(2) of O 49 which is at the root of the problem reads as E
follows:

> The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court. F

The difference of opinion of which I spoke a moment ago arises from the reference in r 6(2) to 'the Registrar of the High Court'. But what the rule does in that context is to limit the time within which the notice of appeal is to be served on a respondent. It is not to be read — and this is how the learned judge here read it — as requiring an appellant to lodge his notice G
of appeal with the Registrar of the High Court.

The normal rule of practice and procedure is that a notice of appeal is to be filed at the registry of the court against whose decision an appeal is being preferred. The purpose is to draw to the attention of the deciding court the fact that its order is being challenged at the appellate level so that H
the judicial arbiter, be it magistrate or sessions judge, may produce written reasons for the decision appealed against. On the other hand, no useful purpose will be served by the notice being lodged with the appellate court. In the first place, there is no machinery for that court to receive and deal with a notice of appeal against the decision of a lower court. Secondly, there will be no notification whatsoever by the dissatisfied party to the I
subordinate court that its decision is being questioned on appeal. Once the notice of appeal is filed in the Registry of the Subordinate Court, there is

A no harm in the appellant furnishing the High Court with a copy of the notice of appeal to keep it informed.

It is undoubtedly within the powers of the Rules Committee to alter the normal practice by making a rule of court to that effect. However, it will require clear and compelling language for such a consequence to
B ensue. In my judgment, the language in which r 6(2) is couched does not have the far-reaching effect of reversing the well-established practice earlier referred to.

I am therefore of the opinion that the rule does not require an unsuccessful litigant to lodge his notice of appeal with the Registrar of the
C High Court. It is sufficient that he files the notice with the Registrar of the Subordinate Court.

The judgment of Low Hop Bing J in *Pandan Maju Sdn Bhd v Dulon Industries Sdn Bhd* [1995] 4 MLJ 737 and that of Augustine Paul JC in *Tan Wee Choon v Tan Kee Kiat (M) Sdn Bhd* (Melaka High Court Civil Appeal
D No 12–22–95, as yet unreported) accord with the views I adhere to and must be treated as correctly stating the law. On the other hand, *Datuk Bandar Kuala Lumpur v Seman bin Amat* [1996] 3 CLJ 263 and all decisions to like effect are not good law and should not be followed. For completeness, they should be overruled.

E I am conscious of the injustice that may have been visited upon litigants by reason of the difference in judicial opinion in that appeals have been dismissed *in limine*. The ends of justice will be best served in such cases by the appropriate courts entertaining applications to set aside the earlier dismissal and to have the appeals restored to the list. In cases where the notice of appeal has already been filed erroneously in the High Court,
F that court should treat the non-observance of the rule as an irregularity and proceed to hear and dispose such appeals on merits in order to ensure that substantial justice is done. I would, in this context, recall to mind that 'a rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice': *Sim Seoh Beng v Koperasi*
G *Tunas Muda Sungei Ara Bhd* [1995] 1 MLJ 292 at p 296.

Turning to the present case, I must say at once that Encik Isa Aziz Ibrahim of counsel for the respondent before us, having heard our preliminary views on the appeal, readily conceded that the appeal had merits. This court expresses its appreciation to counsel for his forthrightness.

H Having come to the conclusion that the notice of appeal was correctly filed and that the appeal was therefore properly brought to the High Court, the appeal to this court was allowed, the learned judge was reversed and his order set aside. The matter was restored to the list of appeals with a direction that the appeal before the High Court be heard on its merits.

I Encik Thangaraj very properly did not move for costs. It was therefore directed that there be no order as to costs and that the deposit paid by the appellant be refunded to him.

7 January 1997

NH Chan JCA: I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA in draft with which I agree.

17 December 1996

Abu Mansor JCA: I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA with which I am in complete agreement except to add that even if there exists an apparent confusion in the words of r 6(2) — 'to the Registrar of the High Court' — if it can be called confusion — it can easily be resolved by referring and adhering to Form 140, for an appellant is statutorily required to file his notice of appeal within 14 days 'in Form 140' which reads as follows:

Form 140

NOTICE OF APPEAL

(Heading)

Take notice that being dissatisfied with the decision of the Sessions/ Magistrates' Court at given on the ... day ... of ... 19..., appeals to the High Court against either/or the whole of the said decision such part of the said decision as decides that

(set out details)

Dated the day ... of ... 19...

.....
Appellant
Solicitor for the Appellant

To

The Registrar, Sessions Court at .....
The Magistrate at .....

What cannot escape our notice and I think is free of any ambiguity is that the Notice of Appeal has to be sent within 14 days:

'To the Registrar, Sessions Court at ..... /The Magistrate at .....'

A As stated above, I agree with the judgment of my learned brother and associate myself with the sentiment and directions already expressed. I agree with him that this appeal be allowed and the learned judge's order be reversed as ordered.

Appeal allowed.

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Reported by Kevin Ooi

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